TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~104~~ 187

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES WEIDE AND JOSEPH R. WEIDE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED DECEMBER 28, 1868.

SUPREME COURT OF THE UNITED STATES.

No. 404.

THE ÆTNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES WEIDE AND JOSEPH R. WEIDE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Summons	4	2
Complaint	5	2
Petition for removal to Circuit Court	10	5
allowed	11	5
Clerk's certificate	11	6
Answer	13	7
Motion to dismiss	22	10
overruled	23	11
Bill of exceptions	23	11
Jury impanneled	24	12
Evidence	25	12
Instructions to jury	34	16
Exhibits	37	17

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States of America in and for the district of Minnesota, greeting:

Because in the record and process, also in the rendering of judgment, in a suit before you, or some of you, between Charles Weide and Joseph R. Weide, plaintiffs, and the Aetna Insurance Company, defendant, in a plea which is in the said Circuit Court, a manifest error hath happened, to the great damage of the said the Aetna Insurance Company, defendant, as it says; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

2 Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the seventh day, the first Monday in December next, in the said Supreme Court, to be then and there held; that the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Withess the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 27th day of June, in the year of our Lord one thousand eight hundred and sixty-eight, and of the independence of the United States the ninety-second year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, dist. of Minnesota.

LAMPREYS, BRISBIN & WARNER,
Attorneys for pl'ffs in error.

3 The answer of the Judges of the Circuit Court of the United States for the district of Minnesota in the eighth circuit, in within writ mentioned:

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States, within mentioned, in a certain schedule to this writ annexed as within it is commanded.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 21st day of July, in the year of our Lord one thousand eight hundred and sixty-eight, and of our independence of the United States the ninety-third year.

[SEAL.] H. E. MANN, *Clerk.*

Endorsed: U. S. Circuit Court, District of Minnesota; Chas. Weide et al. vs. the Aetna Insurance Co. Writ of error. Lampreys & Brisbin & Warner, deft's att'ys.

4 *Schedule referred to in return to foregoing writ of error.*

CHARLES WEIDE AND JOSEPH R. WEIDE
ag'st
THE AETNA INSURANCE COMPANY.

UNITED STATES OF AMERICA, *District of Minnesota, ss:*

Pleas before the honorable the judges of the Circuit Court of the United States of America for the district of Minnesota.

Be it remembered that on the twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-seven and of our independence the ninety-second, came the defendant above-named, by Lampreys & Brisbin & Warner, their attorneys, and filed a duly certified copy of a summons and complaint in the words and figures following, viz:

District Court, Second Judicial District.

Summons.

CHARLES WEIDE AND JOSEPH R. WEIDE
ag'st
THE AETNA INSURANCE COMPANY.

STATE OF MINNESOTA, *County of Rumsey*:

The State of Minnesota to the above-named defendant, greeting:

You are hereby summoned and required to answer the complaint of the plaintiffs in the above-entitled action which has
5 been filed with the clerk of this court at his office in the court-house in Saint Paul, in the county aforesaid, and to serve a copy of your answer to the said complaint upon the subscriber at his office in the city of Saint Paul, in the State aforesaid, within twenty days after the service of this summons on you, exclusive of the day of service; and if you fail to answer the said complaint within the time aforesaid, the said plaintiffs will take judgment against you for the sum of ten thousand dollars, with interest thereon from the 25th day May, A. D. 1867, and the costs of the action.

ALLIS, GILFILLAN & WILLIAMS,
Plaintiffs' Attorneys.

On the back of which certified copy of summons is the following copy of the return thereon:

STATE OF MINNESOTA, *County of Rumsey, ss:*

I certify and return that I have on this 13th day of July, A. D. 1867, served the within summons on the within named defendants by delivering, personally, a true and correct copy thereof to William Powell, managing agent for said company at St. Paul in my county.

Fees, $1 40.

D. H. ROBERTSON,
Sheriff of Ramsey County.

By JOHN GREEN, *Deputy.*

District Court, Second Judicial District.

Complaint.

CHARLES WEIDE AND JOSEPH R. WEIDE
ag'st
THE AETNA INSURANCE COMPANY.

STATE OF MINNESOTA, *County of Rumsey:*

6 The plaintiffs for cause of action against the defendant herein respectfully show to the court:

That they are, and at the times hereinafter mentioned were, citizens and residents of the State of Minnesota, and during said time were co-partners in business as merchants at the city of Saint Paul in said State, under the firm-name and style of Chas. Weide & Bro.

That during all the time hereinafter mentioned the defendant was, and now is, a corporation, duly organized as a fire insurance company under and by virtue of the laws of the State of Connecticut, and was, and now is, doing and transacting its business of insuring against loss or damage by fire within the State of Minnesota under and by authority of the laws thereof.

That on the second day of August, 1866, at St. Paul aforesaid, the defendant, in consideration of the sum of seventy-five dollars to it then and there paid by the plaintiffs, did by its certain policy of insurance by it duly executed and delivered to plaintiffs, insure them to the amount of ten thousand dollars against loss or damage by fire for the term of one year from said date, on their stock of groceries, nails, hollow-ware and other merchandise contained in a three story brick building situated on the south side of Third street, between Minnesota and Robert streets, Saint Paul, Minnesota; and in and by said policy the defendant, for the consideration aforesaid, did promise and agree to and with them to pay and make good unto them,

7 their executors, administrators or assigns, all such immediate loss or damage not exceeding such sum as should happen by fire to the said property w thin one year from said date, to be paid within sixty days after notice and proof thereof made by the plaintiffs in conformity to the conditions annexed to said policy. That the conditions annexed to said policy and referred to in said promise was in the words following, that is to say: "All persons insured by this company and sustaining loss or damage by fire are forthwith to give notice thereof to the company or its agents, and as soon after as possible to deliver in a particular account of such loss or damage signed by their own hands and verified by their oath or affirmation; they shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise or otherwise) the building insured or containing the subject insured and the several parts thereof, were occupied at the time of the loss,

and who were the occupants of said building; and when and how the fire originated, so far as they know or believe, and procure a certificate under the hand of a magistrate or notary public, (most contiguous to the place of the fire and not concerned in the loss as a creditor or otherwise, or related to the sufferers,) that he is acquainted with the character and circumstances of the person or persons
8 insured, and has made diligent into the facts set forth in their statement, and know or verily believes that he, she or they, really and by misfortune and without fraud or evil practice, hath or have sustained by such fire loss and damage therein mentioned."

And after the execution and delivery of such policy of insurance, to wit, on the 22nd day of February, 1867, the building in which the property so insured was contained, was burned, and said property was totally destroyed by fire.

That the actual cash value of said property, at the time of said destruction, was seventy thousand six hundred fifty-four 85-100 dollars.

And forthwith after said fire, the plaintiff gave notice thereof to the defendant, and as soon thereafter as possible, to wit, on the 25th day of March, 1867, they delivered in to defendant a particular account, in writing, of such loss, signed with their own hands, and verified by their oaths; and also, in said account, declared on oath what other insurance had been made on said property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trade, manufactory, merchandise or otherwise) the building containing the property insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, so far as they knew or believed; and did then procure and deliver to defendant, a certificate under the hand of J.
9 Ham Davidson, a notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the plaintiff, that he was acquainted with the character and circumstances of the plaintiffs, and has made diligent inquiry into the facts set forth in said statement, and that he verily believed that they really and by misfortune, and without fraud or evil practice, had sustained by said fire loss and damage to the amount therein mentioned.

And they further say, that they were at the time of such destruction by fire the owners of said property so insured and so destroyed, and there was insured on the same, at the time of said loss, to the amount of forty-five thousand dollars, other than that of defendant hereinbefore set forth.

And they further say, that more than sixty days have elapsed since said notice was given, and said account and certificate delivered as aforesaid, but the defendant has failed and neglected, and still does fail and neglect to make good or pay to them the amount of said loss, or any part thereof, although the plaintiffs have, since the lapse of said sixty days, demanded the same from defendant.

They therefore demand judgment against defendant for the sum of ten thousand dollars, with interest from the 25th day of May, 1867, and their costs of suit.

ALLIS, GILFILLAN & WILLIAMS,
Pl'ff's Att'ys, St. Paul.

10 STATE OF MINNESOTA, *County of Rumsey, ss*:

Charles Weide, being duly sworn, says that he is one of plaintiffs named in the foregoing complaint, and that the said complaint is true of his own knowledge, except as to matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

CHAS. WEIDE.

Sworn and subscribed before me this 3d day of July, 1867.
[SEAL.] E. D. McCLYMENDS,
Notary Public, Rumsey County, Minnesota.

To which copy summons and complaint is attached the following order, admission of service and certificate:

District Court, Second District.

CHARLES WEIDE & JOSEPH R. WEIDE
vs.
THE AETNA INSURANCE COMPANY.

STATE OF MINNESOTA, *County of Rumsey*:

And now the petition of said defendant in this cause, for the removal of said cause to the Circuit Court of the United States for the district of Minnesota for trial, having come on to heard before this court upon such petition, and a bond and security duly approved by this court and filed therein in said cause, and all the papers
11 and proceedings, and the complaint and process in said cause, after hearing Lamprey's attorneys, and of counsel for said defendant in favor of said petition, upon due advisement, it is ordered herein, that said petition herein be, and the same is hereby, granted, and the said cause, above entitled, is hereby removed from this court into the next Circuit Court of the United States to be holden in and for the district of Minnesota, according to the act of Congress in such case provided.

July 29, 1867, 11 o'clock a. m.
By the court.

W. WILKIN,
Dist. Judge.

Endorsed: Due service of the within order, by copy, is hereby admitted this July 29, 1867. Allis, Gilfillan & Williams, pl'ffs att'ys.

STATE OF MINNESOTA, *Rumsey County*, *ss*:

I, Albert Armstrong, clerk of the District Court, second judicial district for county and State aforesaid, do hereby certify that I have compared the foregoing copies with the original summons, complaint and order granting removal, and the indorsements thereon on file, and that the same are correct transcripts thereof, and the whole of the same, and that said originals remain of record in my office.

Witness my hand and seal of said court, at St. Paul, this
12 15th day of August, A. D. 1867.

[SEAL OF COURT.]

ALBERT ARMSTRONG, *Clerk.*

[5-cent revenue stamp cancelled.]

And afterwards, to wit, on the same day, it being the first day of the October term of said court, held at the city of St. Paul, in said district, the said defendants, by its said attorneys, filed in the clerk's office of said court, its precipe for appearance, in the words and figures following, viz:

United States Circuit, district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
ag'st
AETNA INSURANCE COMPANY.

SIR: Please take notice, that we are retained and appear as attorneys for the defendant in the above-entitled action, and ask a copy of the complaint therein.

Dated St. Puul, Oct. 21, A. D. 1867.

Yours, respectfully,

LAMPREYS, BRISBIN & WARNER,
Attorneys for Defendant.

To Messrs. Allis, Gilfillan & Williams, attorneys for plaintiffs.

13 On the back of which was indorsed the following admission of service:

Due service of the within notice is hereby admitted, at St. Paul, Minnesota, on this 21 day of October, A. D. 1867. Allis, Gilfillan & Williams, attorneys for plaintiffs.

And afterwards, to wit, on the 26th day of December, A. D. 1868, came the said defendant by its said attorneys, and filed in the clerk's office of said court its answer to the said plaintiffs' complaint, in the words and figures following, to wit:

United States Circuit Court, district of Minnesota.

CHARLES WEIDE AND JOSEPH R. WEIDE
against
AETNA INSURANCE COMPANY.

The answer of said defendant to the complaint of said plaintiffs in this cause, shows to this court and State—

First. The said defendant expressly and specifically denies each and every allegation, statement, matter and thing, and every part of the same in said complaint contained, as therein stated or otherwise, save as hereinafter stated, admitted or qualified; and said defendant admits that said plaintiffs were citizens and residents of the State of Minnesota, and copartners in business under the firm-name and style of Chas. Weide & Bro. during the time, and as in that
14 behalf stated in said complaint; and said defendant admits that it was and is a corporation duly incorporated and organized as a Fire Insurance Company, under and by virtue of the laws of the State of Connecticut, and transacting and doing business of insuring against loss or damage by fire within the State of Minnesota, under and by authority of the laws of said State, during the time in said complaint alleged.

Second. And further answering herein, said defendant doth admit, aver and say, that on or about the second day of August, 1864, at St. Paul, in the State of Minnesota, the said defendant, in consideration of [of] the sum of one hundred dollars to it then and there paid by said plaintiffs, did, by a certain policy of insurance by it duly executed and delivered to the plaintiffs, insure them in the sum of ten thousand dollars against loss or damage by fire for the term of one year from said day, on their stock of groceries, nails, hollow-ware and other merchandises contained in the three-story brick building mentioned in said complaint, and situated as therein stated, against all such immediate loss or damage as should occur by fire to the property therein specified, not exceeding the sum insured, nor the interest of the assured in the property, except as therein provided, and upon the terms and conditions therein stated and contained, to be paid sixty days after due notice, and
15 satisfactory proofs of the same by the assured, should be received at the office of said company; that said policy provided, and it was covenated and agreed therein and thereby, by said parties, among other things as follows, that is to say:

That said company should not be liable to make good any loss or damage by theft, at or after a fire, and that "all persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company or its agents, and as soon as possible to deliver in a particular account of such loss or damage, signed by their own hands, and verified by their oaths or affirmations; they shall also declare, on oath, whether any, and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein;

in what general manner (as to trade, manufacturing, merchandise or otherwise) the building insured, or containing the subject insured and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated so far as they knew or believed, and procure a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the sufferers or insured, that he is acquainted with the character and circumstances of the person or persons insured, and has
16 made diligent inquiry into the facts set forth in their statement, and knows or believes that he, she or they, really and by misfortune and without fraud or evil practice, hath or have sustained by fire loss and damage to the amount therein mentioned; and also, if required, should produce their books of account and other paper vouchers; and shall also, if required, submit to an examination under oath by the agent or attorney of the company and answer all questions touching his, her or their knowledge of anything relating to such loss or damage or to their claims thereupon, and subscribe such examination, the same being reduced to writing, and until such proofs, declarations and certificates are produced, and examination if required, the loss shall not be deemed payable, also if there appears any fraud or false swearing, the assured shall forfeit all claims under this policy. Also that a copy of all other policies insuring the same property and sharing payment of the same loss with this company shall be given, and a copy of the written portion of the policy shall be given in the affidavit of the claimant in all cases; a reinsurance for any other insurance company to be on the basis of joint liability with said company, and in no event shall this company be liable for a sum greater than such portion as the sum hereby re-insured bears to the whole sum insured on the property by the company reinsured; and in case
17 of loss this company should pay their pro-rata proportion, at the same time, manner and form as the company re-insured." And said policy was made and accepted upon the express terms and conditions above and therein stated.

And that said policy was renewed and continued in said force by said company on or about August second, 1865, for one year, and until August second, 1866, in consideration of the premium therefor to it paid by said plaintiffs; and that said policy was further renewed and continued in force by said company on or about August second, 1866, for one year, and until August second, 1867, at noon, in consideration of the premium to it duly paid by said plaintiffs therefor upon the same terms and conditions aforesaid, and as therein stated.

And that after the execution and delivery of said policy of insurance, to wit, on or about the 22nd day of February, 1867, the said building was mostly burned, but as to whether said property or any of the same so insured was totally or partially or to what extent the same or any of the same was destroyed by fire, then or there or at any time or place said defendant has not any knowledge or information thereof sufficient to form a belief; but said defendant expressly de-

nies that the actual cash value or the value of such property at the time of, or at or about the time of, such fire or alleged loss was
18 seventy thousand six hundred fifty-four 85-100, or any greater sum than twenty thousand dollars in all.

And further answering, said defendant admits, avers and says herein, that on or about the 25th day of March, 1867, said plaintiffs gave notice thereof to said defendant and rendered to it an account of said loss under oath, stating the time of the fire, occupancy of the building aforesaid, at the time of the fire, and what other insurance was on said property, copies of other policies of insurance thereon, what they pretended to be the whole value of the property, and the amount of the loss or damage thereto, and did produce and deliver to it the certificate under seal of a notary public, mentioned in said complaint, containing the statements therein mentioned; but said defendant denies that said notice or proofs were at any time or place satisfactory to said company or true or correct.

That said defendant has not any knowledge or information thereof sufficient to form a belief as to whether or not said plaintiffs were at the time of said fire, or at any time, the owners of the said property or any or what part of the same. And said defendant admits, avers and says, that the whole sum insured upon said property was, and the said plaintiffs were insured thereon at the time of said fire
19 and alleged loss in the further and additional sum of $44,600, over and above that of the said defendant above stated, and that more than sixty days have elapsed since the alleged service of said notice and proofs, and that payment thereof has been demanded of said defendant and that the same has not been paid.

Third. And further answering in this case and for a further defence therein, said defendant charges the facts to be, alleges and avers that heretofore to wit, on or about March 19, 1867, and on or about March 30, 1867, and on or about April 3, 1867, and at different times subsequent to the date of said fire and alleged loss and prior to the date of the commencement of this action at Saint Paul, said plaintiffs and each of them upon his oath, and when not upon oath, wilfully, falsely and fraudulently, and with intent to cheat and defraud said defendant, stated and represented to said company, this defendant, and its agents as follows, to wit; That the amount and value of the property aforesaid belonging to them the said plaintiffs, and so insured as aforesaid, and which was totally destroyed by said fire, was the sum of $70,654 85, at the time of said fire, when in fact the same was not more than $20,000; that the amount of the goods on hand Feb'y 28, 1865, as the primary basis of their claim against
20 said defendant thereon was $47,461 87, when in truth the same was only $25,400 87, then and there; that two of the companies which had insurance upon said property at the time of said fire, the Phœnix and City Fire Insurance Companies, the former having had an insurance of $5,000, and the latter a policy of $3,000 upon said property then and there, had paid the full amount of their policies to said plaintiffs with a slight discount, when in fact both of said companies had been allowed a discount of 46 per cent. upon the

policies by said plaintiffs; and further that said plaintiffs had represented no other or different basis for settlement to any of the companies interested in their loss by said fire than that stated to the Hartford Insurance Company, when in truth said plaintiffs had at that time represented and given to the Phœnix, City Fire, Aetna and Underwriters' Insurance Companies, seven of said companies and each of them, a basis of settlement more than $40,000 below that represented and stated by said plaintiffs to said Hartford Companyas aforesaid; and further that said plaintiffs greatly overstated the amount of the goods purchased by them in the year 1866, and during the year preceding the fire; and further the plaintiffs greatly understated the amount of their sales during the year 1866, and the year preceding the fire, and stated and represented to said defendant and said companies that they had on hand in said building at the time
21 of the fire aforesaid, divers and sundry goods of which they had none on hand whatever there or then. And said plaintiffs have wilfully and grossly misrepresented the facts respecting such fire and loss required by said policy to be stated by them. And the said defendant avers that said plaintiffs and each of them have and did wholly refuse to answer questions relating to the said loss propounded to them by the agent of said company, and this defendant, as required by the terms and conditions of said policy as above stated, and about the last of March or first of April, 1867. And the said plaintiffs have so made such statements and representations and done such acts and things as aforesaid, knowing the same to be false and fraudulent, and with intent to defraud said defendant as aforesaid; and that thereby and by reason thereof all claim under said policy is forfeited and made null and void by the terms thereof, of all of which facts above stated the plaintiffs had full notice and knowledge. Said defendant therefore denies that it is indebted to said plaintiffs or either of them in any sum or for any cause.

Wherefore said defendant demands judgment against said plaintiffs herein, that said plaintiffs take nothing by their action, that said policy be ordered to be given up and cancelled, and for the costs and disbursements of this action.

LAMPREYS & J. B. BRISBIN,
22 *Defendant's Attorneys, Saint Paul, Minn.*

STATE OF MINNESOTA, *County of Ramsey, ss*:

Charles Etheridge came before me, and being duly sworn doth say, that he is the agent and an officer of said defendant, which is a corporation in the above-entitled action, that the foregoing answer is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

CHARLES ETHERIDGE.

Subscribed and sworn to before me this 26th day of December, A. D. 1867.

J. N. CARDOZO,
U. S. Commissioner, Dist. Minn.

And afterwards to wit, at a stated term of said court begun and held at the city of Saint Paul, in said district, on the third Monday, being the 15th day of June, A. D. 1868, on the first day of said term the following proceeding among others was had, to wit:

CHARLES WEIDE *et al.*
vs.
THE AETNA INS. CO.

And now comes the defendant and moves that this cause be
23 dismissed because no new complaint has been filed in this court, which motion was denied by the court.

And the said defendant by their counsel presented to the court its bill of exceptions, which was duly allowed, and signed and sealed and is in the words and figures following, to wit:

United States Circuit Court.

Bill of exceptions.

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE AETNA INSURANCE COMPANY.

DISTRICT OF MINNESOTA, *ss*:

Be it remembered that at the general term of this court on the 15th day of June, A. D. 1868, before the hon. the judges Samuel F. Miller and R. R. Nelson presiding, it appearing from the records of this court that this cause had been transferred to this court, on the first day of the October term thereof for the year 1867, upon the petition of the defendant from the District Court of the State of Minnesota, before issue was joined therein, and there having come into this court from such State Court on the 14th day of October, 1867, a copy of the process and a copy of the complaint in this cause, and the defendant having entered its appearance and answer to the copy of complaint therein in this court, the defendant by its counsel
24 on the 16th day of June, 1868, aforesaid, moved this court to dismiss this action upon the grounds that no original complaint or declaration had been made or entitled or filed in this court in this cause; and thereupon, after argument by counsel such motion was overruled by the court; to which ruling of the court the defendant at the time duly excepted, and such exception was allowed and noted by the court. And now the counsel for the defendant having duly excepted to the rulings of the court above stated and prayed that his bill of exceptions be allowed, and the same having been examined and found to be true, at the request of the counsel for the defendant, the counsel for the plaintiff appearing and present, the foregoing bill of exceptions is hereby allowed, signed and sealed.

[SEAL.] R. R. NELSON,
U. S. Dist. Judge.

And on the third day of said term, being the 17th day of June, A. D. 1868, the following proceeding among others was had:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE COMPANY.

On motion of plaintiffs by their attorneys, ordered tha this cause do stand for immediate trial, whereupon a jury being called came, to wit:

25 James Sturges, J. D. Carr, R. V. Hesselgrave, J. B. Hinckley, John Emerson, J. D. Burns, H. W. Hubbard, J. T. Averill, Wm. S. Combs, H. H. Hopkins, J. C. Cook and Wm. E. Harris, who are duly impannelled and sworn.

The case is opened on the part of the plaintiffs by James D. Gilfillen, their attorney. Joseph R. Weide, sworn and examined as a witness for plaintiffs.

And afterwards, to wit, on the 4th day of said term, being June 18th, 1868, the following proceeding, among others, was had, viz:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE COMPANY.

And now the jury heretofore impannelled in this cause, being called, came. On motion of defendant by its attorneys, that an order be entered that the defendant have leave to inspect the plaintiffs' books of account, it is thereupon ordered that the books of account of the plaintiff, brought into Court by the plaintiff, be taken charge of by the marshal, and that both parties have access to the same during the trial, for examination.

The examination of Joseph R. Weide, witness for plaintiff, resumed.

Charles Weide sworn and examined as witness for plaintiffs.

H. L. Williams " " " "

26 And afterwards, to wit, on the 5th day of said term, being June 19, A. D. 1868, the following proceeding, among others, was had, to wit:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE CO.

And now the jury heretofore impannelled in this cause, being called, came.

Louis Krieger is sworn and examined as a witness for plaintiffs.

Jacob W. Petters " " " "

And here the plaintiffs rest their case.

Case opened on the part of the defendant by Morris Lamprey, esq.

J. W. McClung is sworn and examined as a witness for defendant.
John Reidner " " " "
John C. Rugent " " " "
Theodore Boruss " " " "
P. H. Kelley " " " "
P. F. McQuillan " " " "
J. M. Bohrer " " " "
Jas. K. Humphrey " " " "
O. Curtis " " " "
Thomas H. Howard " " " "
B. Presley " " " "
S. S. Eaton " " " "
——— Livingston " " " "
——— Durand " " " "
Geo. L. Chase " " " "

And here the defendant rests its case.

27 And afterwards, to wit. on the 6th day of said term, being the 20th day of June, the following proceeding among others, was had, to wit:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE CO.

And now the jury heretofore impannelled in this cause, being called, came.

And here the plaintiffs rest their case.

Argument on the part of the defendant by J. B. Brisbin, esq., its attorney.

Argument on the part of the plaintiffs by Lorenzo Allis, esq., their attorney.

Charge is given the jury by the court. Charles Eaton, U. S. marshal. and Julius Strong, his deputy, are each sworn to attend the jury; and the said jury on being returned into court, say they find a verdict for the plaintiff in the sum of ten thousand dollars, with interest from the 25th day of May, A. D. 1867. And now the defendant gives notice of a motion for a new trial.

And afterwards, to wit, on the ninth day of said term, being the 24th day of June, the following, among other proceedings was had, to wit:

28 CHAS. WEIDE *et al.*
vs.
THE AETNA INS. CO.

And now the motion for a new trial heretofore noticed in this cause is brought on for argument, and the counsel for the respective parties having been heard, and the court being fully advised in the premises, it is ordered that the said motion be and same is hereby denied.

And on the third day of said term, being the 17th day of June, A. D. 1868, the following proceeding among others was had:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE COMPANY.

On motion of plaintiffs by their attorneys, ordered tha this cause do stand for immediate trial, whereupon a jury being called came, to wit:

25 James Sturges, J. D. Carr, R. V. Hesselgrave, J. B. Hinckley, John Emerson, J. D. Burns, H. W. Hubbard, J. T. Averill, Wm. S. Combs, H. H. Hopkins, J. C. Cook and Wm. E. Harris, who are duly impannelled and sworn.

The case is opened on the part of the plaintiffs by James D. Gilfillen, their attorney. Joseph R. Weide, sworn and examined as a witness for plaintiffs.

And afterwards, to wit, on the 4th day of said term, being June 18th, 1868, the following proceeding, among others, was had, viz:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE COMPANY.

And now the jury heretofore impannelled in this cause, being called, came. On motion of defendant by its attorneys, that an order be entered that the defendant have leave to inspect the plaintiffs' books of account, it is thereupon ordered that the books of account of the plaintiff, brought into Court by the plaintiff, be taken charge of by the marshal, and that both parties have access to the same during the trial, for examination.

The examination of Joseph R. Weide, witness for plaintiff, resumed.

Charles Weide sworn and examined as witness for plaintiffs.

H. L. Williams " " " "

26 And afterwards, to wit, on the 5th day of said term, being June 19, A. D. 1868, the following proceeding, among others, was had, to wit:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE CO.

And now the jury heretofore impannelled in this cause, being called, came.

Louis Krieger is sworn and examined as a witness for plaintiffs.

Jacob W. Petters " " " "

And here the plaintiffs rest their case.

Case opened on the part of the defendant by Morris Lamprey, esq.

J. W. McClung is sworn and examined as a witness for defendant.
John Reidner " " " "
John C. Rugent " " " "
Theodore Boruss " " " "
P. H. Kelley " " " "
P. F. McQuillan " " " "
J. M. Bohrer " " " "
Jas. K. Humphrey " " " "
O. Curtis " " " "
Thomas H. Howard " " " "
B. Presley " " " "
S. S. Eaton " " " "
——— Livingston " " " "
——— Durand " " " "
Geo. L. Chase " " " "

And here the defendant rests its case.

27 And afterwards, to wit. on the 6th day of said term, being the 20th day of June, the following proceeding among others, was had, to wit:

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE CO.

And now the jury heretofore impannelled in this cause, being called, came.

And here the plaintiffs rest their case.

Argument on the part of the defendant by J. B. Brisbin, esq., its attorney.

Argument on the part of the plaintiffs by Lorenzo Allis, esq., their attorney.

Charge is given the jury by the court. Charles Eaton, U. S. marshal. and Julius Strong, his deputy, are each sworn to attend the jury; and the said jury on being returned into court, say they find a verdict for the plaintiff in the sum of ten thousand dollars, with interest from the 25th day of May, A. D. 1867. And now the defendant gives notice of a motion for a new trial.

And afterwards, to wit, on the ninth day of said term, being the 24th day of June, the following, among other proceedings was had, to wit:

28 CHAS. WEIDE *et al.*
vs.
THE AETNA INS. CO.

And now the motion for a new trial heretofore noticed in this cause is brought on for argument, and the counsel for the respective parties having been heard, and the court being fully advised in the premises, it is ordered that the said motion be and same is hereby denied.

And afterwards, to wit, on the eleventh day of said term, being the 26th day of June, A. D. 1868, the following proceedings, among others, were had.

CHARLES WEIDE *et al.*
vs.
THE AETNA INSURANCE COMPANY.

And now this cause having been tried before a jury, who have found a verdict therein for the plaintiffs in the sum of ten thousand dollars, and interest thereon from the 25th day of May, A. D. 1867, and a motion for a new trial having been made by the defendant and denied by the court, and the clerk under direction of the court computed and ascertained said interest to be the sum of seven hundred and sixty dollars and thirty cents, and the plaintiffs by their
29 attorneys having moved the court for judgment thereupon, it is ordered and adjudged by the court now here, that the plaintiffs do have and recover of and from the said defendant the sum of ten thousand seven hundred and sixty dollars and thirty cents besides their costs by them in and about their suit in this behalf expended to be taxed, and that the plaintiffs have execution therefor.

And thereupon, the counsel for the defendant presented their bill of exceptions to the court, and the same being settled by the court in open court, the counsel for the respective parties being present, was allowed, signed and sealed, and is in the words and figures following, to wit:

CHARLES WEIDE AND JOSEPH R. WEIDE
vs.
THE AETNA INSURANCE COMPANY.

UNITED STATES CIRCUIT COURT,
District of Minnesota ss:

Be it remembered that on the trial of this cause, which came on for trial before this court at a general term thereof, on the 17th day of June, A. D. 1868, the Honorable the Judges Samuel F. Miller and R. R. Nelson presiding. A jury was duly impannelled and sworn to try this cause; and thereupon, to maintain this action on behalf of
30 the plaintiffs, Joseph R. Weide, one of the plaintiffs, was duly sworn as a witness for the plaintiffs and testified that the plaintiffs were wholesale merchants in St. Paul, February 22, 1867, and for several years prior to that time; that their place of business was totally destroyed by fire on that day and nothing was reserved of their stock but goods of the value of $21; that their books were all destroyed except two day-books and one ledger; the day-books, covering entries from some period during the year 1865, and running down to the day of the fire; the ledger contained the posted abstract of the transactions entered upon the day-books. The ledger commenced October [first] first, 1866, and among other things,

purported to contain a merchandise account of the plaintiffs; all the items of which were posted from their day-books, except the first item, which the witness stated was transferred from a former ledger which was lost and which merchandise account came down to the date of the fire.

The witness stated the value of their goods in these at the time of the fire at $65,564 64, and with profits added $70,000 00; the cash inventory of the goods, the last of February, 1866, amounted to $74,500 00. I get the amount from the fly leaf of the ledger upon which in July, 1866, I made an abstract from inventories for several years prior to the fire; the inventories were destroyed by the
31 fire. The witness identified the day-book and ledger, and further testified: Charles Weide and I made the entries in these books; those in the day-books were made at the date of the transactions, they are correct and so are the entries in the ledger. Witness testified. These were books of account kept by plaintiffs in their said business; that they kept no clerk; that the entries in the day-book were the original entries of purchases and sales; that he could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of the taking the last inventory in February, 1866, nor by the purchases or sales after that inventory. And thereupon the defendant cross-examined the said witness among other things as to the entries in said ledger, and as to the entries on the fly leaf and calling the attention of the witness to entries on said fly leaf, questioned him as to the correctness of said entries and of the amounts therein stated:

And thereupon the same testimony in substance as to the books was given by Charles Weide, one of the plaintiffs, who was sworn for the plaintiffs, and testified as to the value of the stock at the time of the fire.

The plaintiffs next offered in evidence the policy of insurance with two renewals thereof, copies of which are hereto annexed marked "A."

32 The defendant objected to the introduction of the same in evidence on the grounds that it was incompetent and improper, and different from the policy set up in the alleged complaint. The court overruled the objections and admitted the evidence, to which ruling of the court the defendant at the time duly excepted, and his exception was then duly noted by the court.

The plaintiffs next offered in evidence "proofs" of which a copy is hereto annexed marked "B." The defendant thereupon objected to such evidence, because such proofs were not made under the contract set up in the complaint and were incompetent and immaterial; the court overruled the objections, to which ruling of the court the defendant at the time duly excepted, and his exception was duly noted by the court, and the evidence was received.

Louis Kreiger and J. W. Petters were each sworn for the plaintiffs, and each gave testimony as to the goods in plaintiffs' store at the time of the fire, and the witness Kreiger as to the value thereof.

The plaintiffs then offered in evidence the said fly leaf of the ledger,

of which a true copy is hereto attached marked "C." The defendant objected to the same upon the ground that the same was incompetent and immaterial, not made at the date of the transaction, and declarations of a party in his own behalf. The court overruled the objections and received the evidence. The defendant then duly excepted to the ruling of the court, and by request of the defendant,
its exception was allowed and noted by the court; and
33 thereupon the plaintiffs offered in evidence there two day-books and ledger above-mentioned, the day-books purporting to contain a current statement of purchases and sales by the plaintiffs during a portion of 1865 and the whole of 1866; the ledger purporting to contain a partial abstract of the contents of the day-books, not made at the date of the transactions; the defendant objected to the day-books and ledger as evidence, severally on the grounds that they were incompetent and immaterial declarations of a party in his own favor, and not made contemporaneously with the transactions to which they refer. The court overruled each of the objections and received the same in evidence. The defendant then only excepted to such rulings severally, and by request of defendant, its exceptions were duly allowed and noted by the court at the time, and Henry L. Williams, sworn as a witness for plaintiffs, testified to the amounts of sales and purchases as appearing from the books. The plaintiffs here rested their case.

And thereupon the defendant to maintain and prove its defence in this cause, called various witnesses who were sworn and their testimony received in evidence for the defence, and other testimony on the part of the defendant in writing was offered and received in evidence, and such testimony and evidence tended to show that the
day-books and ledger above mentioned, received in evidence
34 on behalf of the plaintiffs, and the fly leaf of the ledger above mentioned were unreliable and afforded no data from which the value of plaintiffs' goods on hand at the date of the fire could be ascertained, or the extent of their loss determined, and which testimony and evidence tended to show that the plaintiffs, in their proofs to the defendant, had greatly overstated the amount of their loss by such fire, and tended to prove the defences set up by the defendant in its answer. And thereupon the defendant rested.

And thereupon by request of defendant's counsel in this cause, the court gave to the jury the following instructions, to wit:

1st. The plaintiffs were bound to act in good faith with the insurance company, the defendant, in every respect with reference to their loss, and if the jury are satisfied from the evidence, that there was any fraud or intentional false swearing on the part of the plaintiffs, or either of the plaintiffs, in their proofs or sworn statements to the company respecting their loss or the quantity or value of their goods lost by the fire, the policy is thereby avoided and the plaintiffs cannot recover.

2nd. If the jury are satisfied from the evidence that the plaintiffs wilfully and knowingly greatly overrated the amount and value of their goods lost by the fire with the intention to claim of the

35 defendant more than was justly due them, that would be fraudulent on the part of the plaintiffs and would avoid their policy.

3d. If the jury are satisfied from the evidence in this cause, that the plaintiffs acted fraudulently with the company in respect to their loss or proofs of loss in any one essential particular, the plaintiffs cannot recover.

4th. If the jury are satisfied from the evidence in this cause that the amount of the alleged loss stated in the plaintiffs' proofs, $70,654, greatly exceeded the actual amount of their goods destroyed by the fire, then the burden of proof is upon the plaintiffs to explain the discrepency, and unless such discrepency and misstatements are satisfactorily explained to the jury, the plaintiff cannot recover.

And thereupon the court in its charge to the jury, among other things, by request of plaintiffs' counsel, instructed and charged the jury on such trial in the following words, to wit:

"That if the plaintiffs believed when they made and served the preliminary proofs that the statements in them were true, and that the amount of loss stated was correct, then the defence of fraud is not made out."

And the defendant's counsel then objected to such charge
36 and request to charge, and every part of the same, but the court overruled the objection, and by request of the defendant, the exception of the defendant then duly taken to such ruling was duly allowed, and noted by the court at the time.

And now the counsel for the defendant, upon the trial of said cause having duly excepted and prayed that this his bill of exceptions should be duly signed and allowed, and the same having been examined and found to be true, the foregoing bill of exceptions, at the request of the said counsel for the defendant, is hereby allowed, signed and sealed.

[SEAL.] SAM'L F. MILLER.
[SEAL.] R. R. NELSON.

37 "A."

No. 1392. } Renewal. } ÆTNA INSURANCE CO., OF HARTFORD, CT., *St. Paul, Minn. Agency, August* 2, 1866.

Not valid unless signed by the duly authorized agent, St. Paul, Min.

Received of Charles Weide & Bro., seventy-five dollars, premium on ten thousand dolls. insured to Chas. Weide & Bro. by policy No. 1343, which is hereby continued in force for one year, to wit, from the second day of August, 1866, until the second day of August, 1867, at noon.

E. G. RIPLEY, *President.*
THOS. K. BRUCE, JR., *Secretary.*
CURTIS & ETHERIDGE, *Agents.*

No. 1138. } AETNA INSURANCE CO. OF HARTFORD, CT.,
Renewal. } *Saint Paul Agency, August 2nd*, 1865.

Not valid unless signed by the duly authorized agent at St. Paul, Minn.

Received of Chas. Weide & Bro. seventy-five dollars, premium for ten thousand dollars, insured to them by policy No. 1343, which is hereby continued in force for one year, to wit, from the 2nd day of August, 1865, to the 2nd day of August, 1866, at noon.

E. G. RIPLEY, *President.*
THOS. K. BRUCE, JR., *Secretary.*
ETHERIDGE & POWELL, *Agents.*

38 No. 1343. $10,000.

AETNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

[25-cent revenue stamp, cancelled.]

By this policy of insurance the Aetna Insurance Company, in consideration of one hundred dollars to them paid by the assured hereinafter named, the receipt whereof is hereby acknowledged, do insure Chas. Weide & Bro., of St. Paul, Minnesota, against loss or damage by fire to the amount of ten thousand dollars for the term of one year, on their stock of groceries, nails, hollow ware, and other merchandise contained in 3 story brick building, situated on the south side of Third street, between Minnesota and Robert streets, Saint Paul, Minn.

For further particulars see application and survey No. 1343, furnished by the assured, on file in the office of the Saint Paul agency, which is hereby made a part of this policy.

Other insurance allowed without notice until required.

In consideration of 26 55-100 dollars, return premium on the within policy to us paid, said policy is hereby cancelled to the amount of five thousand dollars, leaving five thousand dollars still pending on said policy.

Saint Paul, Min., Nov. 16, 1866.

O. CURTIS, *State Agt.*

The above indorsement was evidently written with the misapprehension that this policy was renewed for $15,000. The record of this pol. on our books shows the same indorsement, but as
39 having been erased by lines drawn through it. The Aetna does not appear to be charged with amt. of returned premium, as expressed above, ($26 55) cancelling a portion of this policy.

March 11, 1867.

ETHERIDGE & POWELL, *Ag'ts.*

And the said company do hereby promise to make good to the said assured, their executors, administrators and assigns, all such imme-

diate loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the 2nd day of August, one thousand eight hundred and sixty-five, (at 12 o'clock at noon) unto the 2nd day of August, one thousand eight hundred and sixty-five, (at 12 o'clock at noon,) the said loss or damage to be estimated according to the true and actual cash value of the property at the time the same shall happen, and to be paid within sixty days after notice and proof thereof, made by the assured in conformity to the conditions annexed to this policy. Provided always, and it is hereby declared, that this company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or any loss by theft at or after the fire. And provided further, that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, and mentioned in or indorsed on this policy, then this insurance shall
40 be void and of no effect. And if the assured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the assured shall not, in case of loss or damage, be entitled to demand or receive of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property. And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above-mentioned premises shall at any time after the making, and during the continuance of this insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein any trade, business or vocation denominated hazardous, extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or indorsed upon this policy, then, and from thenceforth, so long as the same shall be so appropriated, applied or used
41 these presents shall cease and be of no force or effect. And it is moreover declared that this insurance is not intended to apply to or cover any books of account, written securities, deeds or other evidence to title in lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion. And that this policy is made and accepted into the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

This policy shall not be valid until countersigned by the duly authorized agent of said Aetna Insurance Company, at St. Paul.

In witness whereof the Aetna Insurance Company have caused

these presents to be acknowledged by the names of their president and secretary, of the city of Hartford and State of Connecticut.

THOS. A. ALEXANDER, *President.*
L. J. HENDEE, *Secretary.*

Countersigned at St. Paul, this 2nd day of August, A. D. 1864.
O. CURTIS, *Agent.*

Conditions of insurance referred to in the body of the foregoing policy.

1. Goods not hazardous are such as are usually kept in dry goods stores, including coffee, flour, household furniture and linen,
42 indigo, rice, spices, sugars, teas, and other articles not combustible.

2. The following trades and occupations, goods, wares and merchandise, are denominated hazardous, viz: alcohol, basket sellers, brush maker's stock, cabinet furniture, china, earthen or glass ware, or plate glass in boxes, crates or casks, copper-plate printers, cotton in bales, hat finishers, (without use of fire, except for heating their irons,) hardware and cutlery, jeweller's stock, liquor in glass unpacked, looking-glasses in boxes, manilla grass in bales, paints ground in oil, paper-hanging, porter houses, potash, pocket-book maker's stock, printers of newspapers, rags in packages, sail makers, ship chandlers, spirituous liquors, cigar-makers, stationer's stock, snuff makers, threshed grain, tin or sheet iron workers, victualling houses, watch maker's stock and tools, wine in glass in packages, window or plate glass in packages.

3. The following trades and occupations, goods, wares and merchandise, are denominated extra hazardous, viz: basket makers, straw bleachers, booksellers' stocks, blacksmiths, boat builders, brass founders, china, earthen or glass-ware, or looking-glasses unpacked, confectioner's stock, cotton unpacked, coopers, copper-smiths, druggists and apothecaries, fur dressers, flax in bales, fringe makers, gun makers or smiths, grate makers, hay pressed in bundles, hemp in bails, ink makers, lamp manufacturers, lamp-seller's stock, lithographers, milliner's stock, morocco manufacturers, optical
43 and mathematical instrument makers, painter's stock, perfumer's stock, phosphorus, pictures and prints, printers of books and jobbing, plate or plated-ware manufacturers, pocket-book makers, plumbers and pewterers, saltpeter, silver-smiths, stables, (private,) spirits of turpentine, stove manufactories, tobacco manufacturers, toy keeper's stock, type or stereotype manufacturers, varnish, window and picture glass unpacked.

Mem.—Bakers, brick-mills, blind-makers, breweries, book-binders, blacksmiths, boat builders, cabinet-makers, carpenters, joiners, chair or coach maker's workshops, chemists, cotton mills, dyers, forgers, fences, frame makers, furriers, fulling mills, grist mills, hat manufactories, houses building or repairing, ink or ivory-black manufactories, livery stables, lumber or mahogany yards, malt houses, metal and other mills of all kinds, musical instrument makers, oil makers,

pump and block maker's shops, paper mills, rope makers, saw mills, ship builder's stock in the yards, ships or other vessels in port, or their cargoes, or when building or repairing, steam engines or boats, tanneries, tallow melters and chandlers, timber yards, wollen mills, and generally all manufacturing establishments, and all trades requiring the use of fire, heat or steam power, not before enumerated, will be insured at special rates of premium.

☞ The following are not to be insured at any rate of pre-
44 mium, viz., brimstone works, distilleries, flax-mills, gunpowder, oil-boiling houses, oakum factories, panoramas, or other scenic paintings, patent-leather manufactories, sash and blind factories, snuff-mills, steam plaining-mills, tar boiling houses, theatres, turpentine manufactories, varnish makers, steam saw mills, sugar refineries, and India-rubber factories.

4. Applications for insurance must specify the construction and materials of the building to be insured or containing the property to be insured, by whom occupied, whether as a private dwelling or how otherwise, its situation with respect to contiguous buildings, and their construction and materials, whether any manufactory is carried on within or about it, and, in case of goods or merchandise, whether or not they are of the description denominated hazardous, extra-hazardous or included in the memorandum of special rates, and a false description by the assured of a building or of its contents, or the omission to make known any fact material to the risk, or, in a valued policy, an over valuation shall render absolutely void a policy issued upon such description or valuation. If after insurance is effected either by the original policy or the renewal thereof, the risk be increased by any means within the control of the assured, or if such buildings or premises shall be, with the assent of the insured, occupied in any way so as to render the risk more hazardous than
45 at the time of insuring, such insurance shall be void and of no effect. If, during this insurance, any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Aetna Insurance Company, amount to an over insurance, or the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to cancel this policy after notice given to the assured or his representative of their intention to do so, in which case the company will refund the premium for the unexpired time.

5. No insurance, whether original or continued, shall be considered as binding until the actual payment of the premium.

6. Goods held in trust or on commission are to be insured as such, otherwise the policy will not cover such property, and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured. If the interest or property insured be leasehold or that of mortgage, or any other interest not absolute, such must be made known to this company and expressed in the policy.

46 7. Policies of insurance subscribed by this company shall not be assignable without the consent of the company expressed by endorsement thereon. In case of assignment without such consent, whether of the whole policy or of any interest therein, the liability of the company in virtue of such policy shall thenceforth cease, and in case of any transfer, exchange of title in the property insured by this company, or of any undivided interest therein, such insurance shall be void and cease.

8. This company will not be liable for damage to property by lightning, aside from fire, nor for damage occasioned by the explosion of a steam-boiler, nor for damage by fire resulting from such explosion, nor explosiones caused by gun-powder, gas or other explosive substances, nor for damage occasioned by the use of camphene or burning fluid, coal-oil, petroleum or any of their products by whatever name designated unless otherwise expressly provided. The keeping of gun-powder for sale or on storage, upon or in the premises insured, without written permission in the policy, shall render it void.

9. Jewels, watches, plate, medals, musical instruments, paintings, statuary, sculptures and curiosities are not deemed to be included in any insurance, unless an inventory thereof accompany the application for insurance, or is inserted in the policy.

10. In case of fire, or loss or damage thereby, or of exposure
47 to loss or damage thereby, it shall be the duty of the insured to use all possible diligence, in saving and preserving the property. And if they shall fail so to do this company shall not be held answerable to make good the loss and damage sustained in consequence of such neglect. And it is also mutually understood that there can be no abandonment to the insurers of the subject insured.

11. All persons insured by this company, and sustaining or damage by fire are forthwith to give notice thereof to the company or its agents, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation; they shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein; in what general manner (as to trades, manufactory, merchandise or otherwise) the building insured, or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such buildings; and when and how the fire originated, so far as they know or believe; and procure a certificate under the hand of a magistrate or notary public, (most contiguous to the place of the fire and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers;)
48 that he is acquainted with the character and circumstances of the person or persons insured, and has made diligent inquiry into the facts set forth in their statement, and knows or verily believes that he she or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned, and also if required shall produce their books of account and other proper vouchers; and shall also, if

required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching his, her or their knowledge of anything relating to such loss or damage or to their claim thereupon, and subscribe such examination, the same being reduced to writing, and until such proofs, declarations and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing the insured shall forfeit all claim under this policy. Damage to buildings not totally destroyed shall be appraised by disinterested men mutually agreed upon by the assured and the office or its agents; and when merchandise or other personal property is partially damaged the [the] insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kind, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of
49 each kind. The damage shall then be ascertained and appraised of said damage on each article, by disinterested appraisers mutually agreed upon, whose detailed report in writing shall form a part of the proofs required to be furnished by the claimant, one-half of the appraiser's fees to be paid by the insurers. A copy of the written portion of the policy to be given in the affidavit of the claimant in all cases. Also copy of all other policies insuring same property and sharing and sharing payment of the same loss with this company. A claim for or damage on a policy assigned, when there is no actual sale or transfer of the property insured, proofs of loss shall be made by the assured in conformity with the conditions of this policy in like manner as if no assignment had been made, otherwise this policy shall be void and of no force or validity whatever, and all liability on the part of this company shall cease. Re-insurance for any other insurance company to be on the basis of joint liability with said company, and in no event will this company be liable for a sum greater than such portion as the sum hereby insured bears to the whole sum insured on the property by the company re-insured, and in case of loss this company to pay their pro-rata proportion at the same time, manner and form as the company re-insured. Plans and specifications of buildings, machinery and fixtures damaged or destroyed must be furnished free of expense, when requested.
50 When an inventory of merchandise or other property, sound or damaged, is to be taken in adjusting a claim for loss or damage, this company shall have notice and the appointment of one or more assistants to complete such listing of property, when required by its agent.

12. Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise, touching any loss or damage, it may be submitted to the judgment of arbitrators indifferently chosen, whose award in writing shall be binding on the parties. In case of any loss on, or damage to the property insured, it shall be optional with the company to replace the articles lost or damaged with others of the same kind and equal goodness, and to rebuild or repair the building or buildings, within

a reasonable time, giving notice of their intention so to do, within thirty days after the preliminary proofs shall have been received at the office of the company.

13. Insurance, once made, may be continued for such further periods as may be agreed upon, the premium thereon being paid, and a renewal receipt being given for the same, and it shall be considered continued under the original representation, terms, specifications and conditions, in so far as not plainly varied in writing. When the risk has been changed either within itself or by the surrounding or adjacent premises, it shall be incumbent on the party insured to give notice thereof, and have the same described and assented to in writing.

51 14. When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.

15. Where property insured by this company is damaged by removal from a building in which it is exbosed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

16. The company will not be answerable for any loss arising from the use of fires in buildings unprovided with good and substantial stone or brick chimney or chimneys, or in consequence of neglect or deviation from the laws or regulations of police made to prevent accidents from fires in places where laws and regulations on this subject exist.

17. It is furthermore hereby expressly provided that no suit or action against said company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against said

52 company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed evidence against the validity of the claim thereby so attempted to be enforced.

In consideration of the sum of seventy-five dollars, the additional sum of five thousand is hereby insured on the within described stock making the sum now insured fifteen thousand dollars.

CURTIS & ETHERIDGE, *Agents*.

ST. PAUL, *February* 1, 1865.

In consideration of $18 75 the additional sum of five thousand dollars is hereby insured on the within-described stock, from February 2, 1866, to August 2, 1866, making the amount now covered by this policy $15,000.

CURTIS & ETHERIDGE, *Agents*.

[Revenue stamp 5-cents, cancelled.]

53 "B."

STATE OF MINNESOTA, *County of Ramsey, ss:*

To the Aetna Insurance Company of Hartford, Conn.:

Be it known that on this 9 day of March, A. D. 1867, before me, Mock J. Leaming, a notary public, legally qualified for the county aforesaid, personally appeared Joseph R. Weide, one of the firm of Chas. Weide & Bro., who, being duly sworn according to law, declares under oath, that the Aetna Insurance Company of Hartford, Connecticut, through its agency at St. Paul, did, on the 2nd day of August, A. D. 1864, issue to Chas. Weide & Bro., their policy of insurance, No. 1343, the written body of which, with its immediate context and of written indorsements and statements of renewals of said policy are, as below specified; said insurance terminating on the 2nd day of August, 1865, at noon.

No. 1343.

By this policy of insurance, the Aetna Insurance Company, in consideration of one hundred dollars to them paid by the assured hereinafter-named, the receipt is hereby acknowledged, do insure Chas. Weide & Bro., Saint Paul, against loss or damage by fire to the amount of ten thousand dollars for the term of one year on their stock of groceries, nails, hollowware and other merchandise con-
54 tained in the three story brick building situate on the south side of Third street, bet. Minnesota and Robert street, Saint Paul, Minnesota. For further particulars see application and survey No. 1343, furnished by the assured, on file in the office of the Saint Paul agency which is hereby made a part of this policy.

Other insurance allowed without notice until required.

Which said policy was subsequently continued in force by renewal until the 2nd day of August, 1866, and subsequently by renewal until the 2nd day of August, 1867, at noon. Said policy was indorsed on the first day of February, 1865, as follows:

In consideration of seventy-five dollars an additional sum of five thousand dollars is hereby insured on the within-described stock, making the sum now insured $15,000.

Saint Paul, February 1st, 1865.

CURTIS & ETHERIDGE, *Agents.*

In consideration of eighteen and 75–100 dollars, an additional sum of five thousand dollars is hereby insured on the within-described stock from February 2nd, 1866, to August 2, 1866, making the amonnt now covered by this policy, $15,000.

CURTIS & ETHERIDGE, *Agents.*

55 And besides that insurance there was $44,600 made thereon as per schedule "A" herewith annexed, containing written portions of the policies; that the whole cash value of the property so

insured, amounted to the sum of seventy thousand six hundred and seventy-six 74–100 dollars at the time immediately preceding the disaster. Their interest therein being absolute. The occupations and occupants of the premises in its several parts being used by the assured as a wholesale grocery store and occupied by them only. Apart of the second story being used for the storage of mattrasses and furniture belonging to Elter Bro., Saint Paul, Minn. The fire occurred on the morning of February 22nd, 1866, and originated from causes unknown. The amount of property belonging to them so insured which was totally destroyed by fire was..... $70,654 83
The sum of damage on that saved as per appraisement being.....
Amount of claim..... $10,000

As are particularly defined and exposed in the accompanying statements appended hereto and made part of this voucher.

That the statement of the particulars of the account of the loss are believed to be just and true, and that no articles are specified therein but such as belonged to them.

JOSEPH R. WEIDE.

56 Joseph R. Weide, having first been duly sworn according to law, and subscribed the preceeding declaration and affidavit, I have in witness thereof set my hand and seal of office in the State, county and date aforesaid.

[NOTARIAL SEAL.] MARK J. LEAMING,
Notary Public, Rumsey County, Minnesota.

[5-cent revenue stamp.]

STATE OF MINNESOTA, *County of Ramsey, ss:*

I, Mack J. Leaming, a notary public in and for said county, residing most contiguous to the property of Chas. Weide & Brother, insured as set forth in the preceeding affidavit, certify that I am not concerned in that loss or any claim either as a creditor or otherwise, or related to the insured or sufferers, and that I am acquainted with the character and circumstances of Chas. Weide & Brother, having made diligent inquiry into the facts set forth in the foregoing statement, and believe and know that they really, by misfortune without fraud or evil practice, sustained, by the described fire, loss and damage to the amount of seventy thousand six hundred and fifty-four 85–100 dollars, the sum stated in their affidavit of loss.

In testimony whereof I have hereunto set my hand and affi-
57 cial seal this 19th day of March, A. D. 1867.

[NOTARIAL SEAL.] MACK J. LEAMING,
Notary Public, Ramsey County, Minnesota.

58 "C."

Inventory of goods taken Feb'y. 27, 1863.

Merchandise	$21, 872 34
Book a'cs as pr. ledger, notes and cash	18, 384 65
Real estate	300 00
Store fixtures	396 60
	40, 953 59
Liabilities	8, 921 14
	32, 032 45

1864.

Merchandise	$36, 791 21
Book a'c's, notes & cash	24, 921 69
Real estate	900 00
Store fixtures	396 60
	$63, 009 50
Liabilities	17, 000 00
	$46, 009 50

1865.

Merchandise	47, 561 87
Book a'c's, notes & cash	30, 927 62
Real estate	900 00
Store fixtures	396 60
	$79, 786 09
Liabilities	27, 140 51
	$52, 645 58

1866. Feb'y 28th.

Merchandise	$74, 520 74
	39, 169 64
	900 00
	396 60
	$114, 986 98
Liabilities	56, 656 29
	$58, 330 69

Supreme Court of the United States.

DECEMBER TERM, 1869.

ÆTNA INSURANCE COMPANY,

Plaintiff in Error,

vs.

CHARLES WEIDE, and
JOSEPH R. WEIDE,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN B. BRISBIN,
MORRIS LAMPREY,
Of Counsel for Plaintiff in Error.

SAINT PAUL:
PIONEER BOOK AND JOB PRINTING COMPANY.

1870.

SUPREME COURT

Of the United States.

DECEMBER TERM, 1869.

ÆTNA INSURANCE COMPANY,
Plaintiff in Error,

vs.

CHARLES WEIDE, and
JOSEPH R. WEIDE,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN B. BRISBIN,
MORRIS LAMPREY,
Of Counsel for Plaintiff in Error.

St. Paul Pioneer Print.

Supreme Court of the United States.

(1) DECEMBER TERM, 1869.

THE ÆTNA INSURANCE COMPANY,
Plaintiff in Error,
vs.
CHARLES WEIDE and JOSEPH R. WEIDE,
Defendants in Error.

ABSTRACT OF THE CASE.

This case is brought up by Writ of Error to the Circuit Court of the United States for the District of Minnesota.

THE RECORD

Shows, pages 2 to 6, inclusive, that the plaintiffs below, Charles Weide and Joseph R. Weide, commenced their action against the Ætna Insurance Company, defend-
(2) ant below, on the 13th day of July, A. D. 1867, by filing their complaint and service of a summons upon said defendant below, in the District Court for the Second District, County of Ramsey, and State of Minnesota, the summons requiring the defendant to answer the complaint therein, within twenty days after service thereof, (folio 5). That afterwards, July 29th, 1867, the said State Court, by its order of that date, (folio 11), removed the said cause,
(3) on petition of the defendant below, from the State Court into the next Circuit Court of the United States, to be holden in said District of Minnesota, under and pursuant to the twelfth section of the judicial act of September

24th, 1789, chapter 20, section 12, 1 Statutes at Large, page 73, which only required copies of the process against the defendant to be entered in such Court of the United States (4) on the first day of its session, and also that the defendant should there appear. No special bail was originally requisite in this case, and the said act provides that "the said copies being entered as aforesaid in such Court of the United States, the cause shall there proceed in the same manner as if it had been brought there by" original process.

That afterwards, on the 21st day of October, 1867, being (5) the first day of the next term of such Circuit Court of the United States, the defendant below appeared by its attorneys (folio 4), and filed a copy of the summons and complaint in the State court, in the office of the clerk of the circuit court of the United States, and at the same time served and entered its appearance in such circuit court of the United States, (folio 12).

This action was brought to recover the sum of $10,000 and interest, of the Ætna Insurance Company, upon a pol- (6) icy of insurance alleged to have been executed by the Ætna Insurance Company, to Charles Weide and Joseph R. Weide, August 2d, 1866, upon their stock of groceries, nails, hollow-ware and other merchandise contained in their three story brick building, the assured alleging that the cash value of said property was $70,654.85, and that the same was totally destroyed by fire February 22d, 1867. The defendant below afterwards by its answer in the circuit court of the United States, set up the following defences in (7) said action, pages 7, 8, 9, 10: that it executed its policy of insurance August 2d, 1864, to the said Charles Weide and Joseph R. Weide, in the sum of $10.000, against loss or damage by fire for one year, on their said property, not exceeding the sum insured, nor the interest of the assured in the property, and upon the terms and conditions in said

policy contained; that said policy was renewed from year to year, until August 2d, 1867; that said policy provided (8) and it was covenanted and agreed therein, and thereby, by said parties, among other things as follows, that is to say, (folios 47,48,49,) "All persons insured by this Company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the Company or its agents, and as soon as possible to deliver in a particular account of such loss or damage, signed by their own hands, and verified by their oaths or affirmations; they shall also declare on oath (9) whether any and what other insurance has been made on the same property, what was the whole value of the subject insured, what was their interest therein, * * * and also, if required, should produce their books of account and other proper vouchers, aad shall also, if required, submit to an examination, under oath, by the agent or attorney of the Company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, or to their claims thereupon, and subscribe such (10) examination, the same being reduced to writing, and until such certificates, declarations and proofs are produced, and examination, if required, the loss shall not be deemed payable; also, if there appears any fraud or false swearing, the assured shall forfeit all claims under this policy, this Company to be liable only for its proportion of loss in case of other Insurance;" that said policy was made and accepted upon the express terms therein stated.

The answer of the defendant below also put in issue the (11) alleged destruction of the property by the fire, and the alleged value of the property at the time of the fire, and alleges that the value of the property did not exceed $20,000 in all, then or there, and puts in issue the ownership of the property; the answer sets up that there was additional insurance on the property, at the time of the fire, the sum of $44,600.

The answer further sets up (folio 19 to 21 inclusive), that on different dates, between March 19th, 1867, and the
(12) date of the commencement of the action, the said assured, and each of them, upon his oath, and when not upon oath, wilfully, falsely and fraudulently, and with intent to cheat and defraud the defendant below, stated and represented to the said Company and its agents, as follows, to wit: that the value of their property so insured and totally destroyed by said fire, was $70,654.85 at the time of the fire, when in fact the same was not more than $20,000 then and there.

That the amount of their goods on hand February 28th,
(13) 1865, as the primary basis of their claim, was $47,461.87, when in truth the same was only $25,400.87, then and there.

That two of the companies, the Phœnix and City Fire, having had an insurance of $5,000 and $3,000, respectively, on said property, then and there had paid the full amount of their policies to said plaintiffs, with a slight discount, when in fact both of said companies had been allowed a discount of forty-six per cent.

That said assured, plaintiffs below, had represented no
(14) other or different basis for settlement to any of the companies interested in their loss, than that stated to the Hartford Insurance Company, when in truth said plaintiffs below had at that time represented and given to the Phœnix, City Fire, Ætna and Underwriters Insurance Companies, being seven of said companies, and each of them, a basis of settlement more than $40,000 below that stated by them to said Hartford Company.

That the assured greatly overstated the amount of goods
(15) purchased by them in 1866, and during the year before the fire, and further, the plaintiffs greatly understated the amount of their sales during the year 1866 and the year before the fire, and represented to the defendant below and

said Companies that they had on hand in said building at the time of the fire, divers goods of which they had none on hand then or there; that said plaintiffs wilfully and grossly misrepresented the facts respecting such fire and loss, required by said policy to be stated by them; that (16) they and each of them wholly refused to answer questions relating to said loss, propounded to them by the agent of said Company, as required by said policy; that the said plaintiffs made such statements and did such acts and things, knowing the same to be false and fraudulent, and with intent to defraud the defendant below, and that thereby said policy and all claim thereunder were rendered null and void by the terms thereof.

And the bill of exceptions, page 11, of the record, shows (17) that on the 16th day of June, 1868, this cause having been transferred to this court from the State court, on the first day of the October term of this court, for the year 1867, on petition of the defendant below, before issue was joined, and there having come into this court from such State Court, October 14, 1867, a copy of the process, and a copy of the complaint in this cause, and the defendant below having entered its appearance and answer in this court, the defendant, by its counsel, moved this court to (18) dismiss this action, upon the grounds that no original complaint or declaration had been made, or entitled, or filed in this court in this cause; and thereupon, after argument by counsel, such motion was overruled by the court, to which ruling of the court the defendant, at the time, duly excepted, and such exception was allowed and noted by the court, and his bill of exceptions, showing the same, was duly allowed, signed and sealed by the court.

(19) The record further shows (folios 30, 31, 32, 33,) in the bill of exceptions of the defendant below, that one of the plaintiffs, Joseph R. Weide, sworn as a witness for the plaintiffs, testified as follows: That the plaintiffs were wholesale

merchants in St. Paul, February 22, 1867, and for several years prior to that time; that their place of business was totally destroyed by fire on that day, and nothing was reserved of their stock but goods of the value of $21; that (20) their books were all destroyed, except two daybooks and one ledger, the daybooks covering a period from some time in the year 1865, and running down to the day of the fire; the ledger contained a posted abstract of the transactions entered upon the daybooks; the ledger commenced October 1st, 1866, and, among other things, purported to contain a merchandise account of the plaintiffs, all the items of which were posted from their daybooks ex- (21) cept the first item, which the witness stated, was transferred from a former ledger which was lost, and which merchandise account came down to the date of the fire.

The witness stated the value of their goods in these at the time of the fire, at $65,564.64, and with profits added, $70,000; the cash inventory of the goods the last of February, 1866, amounted to $74,500. I get the amount from the fly-leaf of the ledger, upon which, in July, 1866, I made (22) an abstract from inventories for several years prior to the fire; the inventories were destroyed by the fire. The witness identified the daybooks and ledger, and further testified: Charles Weide and I made the entries in these books; those in the daybooks were made at the date of the transactions; they are correct, and so are the entries in the ledger. Witness testified: These were books of account kept by plaintiffs in their said business; that they (23) kept no clerk; that the entries in the daybooks were the original entries of purchases and sales; that he could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory in February, 1866, nor by the purchases and sales after that inventory.

And thereupon, the same testimony, in substance, as to

the books, was given by Charles Weide, one of the plaintiffs, sworn for the plaintiffs.

The plaintiffs below then offered in evidence the said fly-
(24) leaf of the ledger, which was in the words and figures following, to-wit:

INVENTORY OF GOODS TAKEN FEB. 27, 1863.

Merchandise,	$21,872 34
Book acc'ts as per ledger, notes and cash,	18,384 65
Real estate,	300 00
Store fixtures,	396 60
	40,953 59
Liabilities,	8,921 14
	$32,032 45

1864.

Merchandise,	$36,791 21
Book accounts, notes and cash,	24,921 69
Real estate,	900 00
Store fixtures,	396 60
(25)	63,009 50
Liabilities,	17,000 00
	$46,009 50

1865.

Merchandise,	$47,561 87
Book accounts, notes and cash,	30,927 62
Real estate,	900 00
Store fixtures,	396 60

The answer further sets up (folio 19 to 21 inclusive), that on different dates, between March 19th, 1867, and the
(12) date of the commencement of the action, the said assured, and each of them, upon his oath, and when not upon oath, wilfully, falsely and fraudulently, and with intent to cheat and defraud the defendant below, stated and represented to the said Company and its agents, as follows, to wit: that the value of their property so insured and totally destroyed by said fire, was $70,654.85 at the time of the fire, when in fact the same was not more than $20,000 then and there.

That the amount of their goods on hand February 28th,
(13) 1865, as the primary basis of their claim, was $47,461.87, when in truth the same was only $25,400.87, then and there.

That two of the companies, the Phœnix and City Fire, having had an insurance of $5,000 and $3,000, respectively, on said property, then and there had paid the full amount of their policies to said plaintiffs, with a slight discount, when in fact both of said companies had been allowed a discount of forty-six per cent.

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(14) other or different basis for settlement to any of the companies interested in their loss, than that stated to the Hartford Insurance Company, when in truth said plaintiffs below had at that time represented and given to the Phœnix, City Fire, Ætna and Underwriters Insurance Companies, being seven of said companies, and each of them, a basis of settlement more than $40,000 below that stated by them to said Hartford Company.

That the assured greatly overstated the amount of goods
(15) purchased by them in 1866, and during the year before the fire, and further, the plaintiffs greatly understated the amount of their sales during the year 1866 and the year before the fire, and represented to the defendant below and

said Companies that they had on hand in said building at the time of the fire, divers goods of which they had none on hand then or there; that said plaintiffs wilfully and grossly misrepresented the facts respecting such fire and loss, required by said policy to be stated by them; that (16) they and each of them wholly refused to answer questions relating to said loss, propounded to them by the agent of said Company, as required by said policy; that the said plaintiffs made such statements and did such acts and things, knowing the same to be false and fraudulent, and with intent to defraud the defendant below, and that thereby said policy and all claim thereunder were rendered null and void by the terms thereof.

And the bill of exceptions, page 11, of the record, shows (17) that on the 16th day of June, 1868, this cause having been transferred to this court from the State court, on the first day of the October term of this court, for the year 1867, on petition of the defendant below, before issue was joined, and there having come into this court from such State Court, October 14, 1867, a copy of the process, and a copy of the complaint in this cause, and the defendant below having entered its appearance and answer in this court, the defendant, by its counsel, moved this court to (18) dismiss this action, upon the grounds that no original complaint or declaration had been made, or entitled, or filed in this court in this cause; and thereupon, after argument by counsel, such motion was overruled by the court, to which ruling of the court the defendant, at the time, duly excepted, and such exception was allowed and noted by the court, and his bill of exceptions, showing the same, was duly allowed, signed and sealed by the court.

(19) The record further shows (folios 30, 31, 32, 33,) in the bill of exceptions of the defendant below, that one of the plaintiffs, Joseph R. Weide, sworn as a witness for the plaintiffs, testified as follows: That the plaintiffs were wholesale

merchants in St. Paul, February 22, 1867, and for several years prior to that time; that their place of business was totally destroyed by fire on that day, and nothing was reserved of their stock but goods of the value of $21; that (20) their books were all destroyed, except two daybooks and one ledger, the daybooks covering a period from some time in the year 1865, and running down to the day of the fire; the ledger contained a posted abstract of the transactions entered upon the daybooks; the ledger commenced October 1st, 1866, and, among other things, purported to contain a merchandise account of the plaintiffs, all the items of which were posted from their daybooks ex- (21) cept the first item, which the witness stated, was transferred from a former ledger which was lost, and which merchandise account came down to the date of the fire.

The witness stated the value of their goods in these at the time of the fire, at $65,564.64, and with profits added, $70,000; the cash inventory of the goods the last of February, 1866, amounted to $74,500. I get the amount from the fly-leaf of the ledger, upon which, in July, 1866, I made (22) an abstract from inventories for several years prior to the fire; the inventories were destroyed by the fire. The witness identified the daybooks and ledger, and further testified: Charles Weide and I made the entries in these books; those in the daybooks were made at the date of the transactions; they are correct, and so are the entries in the ledger. Witness testified: These were books of account kept by plaintiffs in their said business; that they (23) kept no clerk; that the entries in the daybooks were the original entries of purchases and sales; that he could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory in February, 1866, nor by the purchases and sales after that inventory.

And thereupon, the same testimony, in substance, as to

the books, was given by Charles Weide, one of the plaintiffs, sworn for the plaintiffs.

The plaintiffs below then offered in evidence the said fly-
(24) leaf of the ledger, which was in the words and figures following, to-wit:

INVENTORY OF GOODS TAKEN FEB. 27, 1863.

Merchandise, - - - - -	$21,872 34
Book acc'ts as per ledger, notes and cash,	18,384 65
Real estate, - - - - -	300 00
Store fixtures, - - - -	396 60
	40,953 59
Liabilities, - - - - -	8,921 14
	$32,032 45

1864.

Merchandise, - - - - -	$36,791 21
Book accounts, notes and cash, - -	24,921 69
Real estate, - - - - -	900 00
Store fixtures, - - - -	396 60
(25)	63,009 50
Liabilities, - - - - -	17,000 00
	$46,009 50

1865.

Merchandise, - - - - -	$47,561 87
Book accounts, notes and cash, - -	30,927 62
Real estate, - - - - -	900 00
Store fixtures, - - - -	396 60

	$79,786 09
Liabilities, - - - - -	27,140 51
	$52,645 58
1866—Feb. 28th.	
Merchandise, - - - - -	$74,520 74
	39,169 64
	900 00
	396 60
	$114,986 98
Liabilities, - - - - -	56,656 29
	$58,330 69

The defendant objected to the same, upon the ground that the same was incompetent and immaterial, not made (26) at the date of the transaction, and declarations of a party in his own behalf; the court overruled the objections and received the evidence; the defendant then duly excepted to the ruling of the court, and by request of the defendant its exception was duly allowed and noted by the court then and there.

And thereupon the plaintiffs offered in evidence their two daybooks and ledger above mentioned, the daybooks purporting to contain a current statement of purchases and sales of the plaintiffs during a portion of 1865, and the (27) whole of 1866, the ledger purporting to contain a partial abstract of the contents of the daybooks, not made at the date of the transactions; the defendants objected to the daybooks and ledger as evidence, severally, on the grounds that they were incompetent and immaterial, declarations of a party in his own favor, and not made contemporaneously with the transactions to which they refer. The court overruled each of the objections, and received

(28) each of the same in evidence; the defendant then duly excepted to such rulings severally, and by request of the defendant its exceptions were duly allowed, and noted by the court at the time.

And thereupon the court in its charge to the jury, (folio 35) among other things, by request of plaintiff's counsel, instructed and charged the jury in such trial, in the following words, to-wit: "That if the plaintiffs believed when they made and served the preliminary proofs, that the statements in them were true, and that the amount of loss stated was correct, then the defence of fraud is not made out," and (29) the defendant's counsel then objected to such charge, and request to charge, and every part of the same, but the court overruled the objection, and by request of the defendant, the exception of the defendant then duly taken to such ruling, was duly allowed and noted by the court at the time.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

I.

Upon the transfer of the cause from the State Court to the Circuit Court of the United States, the action should (30) have proceeded in the same manner as if then originally commenced in said Circuit Court of the United States, and the plaintiffs below were required to file a new complaint or declaration therein, and there being no complaint or declaration made, or entitled, or filed in said cause at all by the plaintiffs in the Circuit Court of the United States, there was no declaration for the defendant to answer; it became a question of jurisdiction, and the action (31) should have been dismissed on defendant's motion.

The act of Congress did not require the defendant to file any copy of declaration or complaint in the Circuit Court, and the defendant could not plead for the plaintiffs.

1 Stats. at Large, page 73, Chap. 20, Section 11. 2 Circ. (N. Y.,) 1846. Martin vs. Kanouse, 1 Blatchford, 149.

2d Circ. (N. Y.) 1851. Coggill vs. Lawrence, 2 Blatchf., 304.

McLeod vs. Duncan, 5 McLean, 342.

II.

The evidence showed (folios 30, 31 of the record,) that the witnesses, Joseph Weide and Charles Weide, plaintiffs, (32) got the amount of the goods destroyed from the fly-leaf of the ledger, upon which in July, 1866, the witness, Joseph Weide, made an abstract from inventories for several years prior to the fire, which inventories were destroyed by the fire. The witness (folio 31) " could not state from recollection the amount or value of the stock on hand at the time of the fire, nor at the time of taking the last inventory in February, 1866, nor by the purchases or sales after that in- (33) ventory." The witness must therefore have relied upon this fly-leaf in giving his testimony. Hence this fly-leaf became exceedingly important as the only alleged basis for fixing the amount or value of the stock on hand at the time of the fire. Now this fly-leaf of the ledger purports to contain an abstract of inventories for four years,

1863, 1864, 1865 and 1866. The witness says the entries on this fly-leaf were all made July, 1866, and were an ab-
(34) stract from inventories for several years prior to the fire. The witness does not state that he made these inventories or knew them to be correct. It follows, therefore, that this fly-leaf was a mere abstract from inventories for several years, not produced and not known to be correct, and only a partial copy of such inventories, and not made at the date of the transaction. We respectfully submit that the Court below erred in receiving this fly-leaf in evidence, because the entries thereon were not made at the date of the transaction, were declarations of a party in his own be-
(35) half, and were incompetent and immaterial; and we urge the same objections to the admission of the daybooks and ledger, and each of them, in evidence.

The bill of exceptions (folio 30 of the record,) shows that the ledger commenced October 1, 1866, and among other things purported to contain a merchandise account of the plaintiffs, all of the items of which were posted from their daybooks, *except the first item, which the witness stated was transferred from a former ledger, which was lost*, and which former ledger is not shown to have been correct; this
(36) ledger was, therefore, clearly incompetent for any purpose. The first item affects the whole account.

Marcly vs. Shults, 29 N. Y., 346.

Coggswell vs. Dolliver, 2 Mass., 217.

Prince vs. Smith, 4 Mass., 454.

III.

The courts of the United States are bound to take judicial cognizance of the laws of the different States.

Gordon vs. Hobart, 2 Sumner, 401.

The Statutes of Minnesota, Revision of 1866, page 528, Sec. 70, provide, "Whenever a party in any cause or proceeding produces at the trial his account books, and swears that the same are his account books, kept for that purpose; that they contain the original entries of charges for goods, or other articles delivered, or work and labor, or other services performed, or materials found, and that such entries are just to the best of his knowledge and belief; that said entries are in his own handwriting, and that they were made at or about the time said goods or articles were delivered, said work, or labor, or other services were performed, or said materials were found," then the party offering such books being subject to cross-examination, if it appears upon the examination of such party that all of the interrogatories in this section contained, are satisfactorily established in the affirmative, then the said books shall be received as *prima facie* evidence of the charges therein contained. We therefore insist that the said daybooks and ledger, and each of them, and the said fly-leaf, could not be competent, in any view, as account books proper.

To introduce into any cause a copy of any paper, the truth of the copy must be established, and a proper foundation laid for it. Smith vs. Carrington, 4 Cranch., 65; Catlin vs. Underhill, 4 McLean, 199; 1 Cranch., C. Ct., 87.

IV.

The fly-leaf and the first item in the merchandise account in the ledger were not used to refresh the witness's recollection, because in that case after the witness refreshes his recollection, the memorandum must be laid aside, and the witness must be able to testify from his recollection independent of his memorandum. But the said fly-leaf and first item were offered as evidence *per se;* they were not original entries, but were partial copies from old inventories not produced, and therefore could not be admitted in evidence.

1 Phillips on Evidence, Cow. & Hill & Edward's Notes, 4th American Edition, p. 585, 586, and note, and cases there cited.

Robertson vs. Lynch, 18 Johns., 451.

Feeter vs. Heath, 11 Wend, 479.

5 Serg. & Rawle, 87.

12 Serg. & Rawle, 87.

2 Phil. on Ev. Cow. H. & Edw. Notes, 4th American Edition, pages 577, 578, and notes and cases there cited.

Clute vs. Small, 17 Wend, 238.

V

We respectfully insist that the charge of the court to the jury, was not correct, and that the plaintiffs below can claim no immunity from the charge of fraud, if they believed, when they made and served the preliminary proofs, that the statements in them were true, and that the amount of loss stated was correct; *provided*, they had facts within their own knowledge sufficient to put them on inquiry, and (37) upon such inquiry, in the exercise of ordinary care, they would have learned that such statements made by them were grossly untrue, and that such amount of loss stated by them was grossly overstated, incorrect and false, and we think this request to charge, on the part of said plaintiffs below, should have been modified accordingly, and that the giving of it to the jury without qualification, was error.

Every man is presumed to intend the consequences of his acts, and fraud can be inferred from circumstances, and need not be expressly proved.

4 McLean, 437.

Tardy vs. Morgan, 3 McLean, 358.

VII.

Upon the whole, we submit that the judgment in this case (38) should be reversed.

JOHN B. BRISBIN,
MORRIS LAMPREY,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

THE ÆTNA INSURANCE COMPANY,
Plaintiff in Error,

vs.

CHARLES WEIDE and JOSEPH R. WEIDE,
Defendants in Error.

Supreme Court of the United States.

THE ÆTNA INSURANCE COMPANY,
Plaintiff in Error,

vs.

CHARLES WEIDE and JOSEPH R. WEIDE,
Defendants in Error.

POINTS FOR DEFENDANTS IN ERROR.

I.

This Court will not review the decision of the Court below on the motion of Plaintiff in Error to dismiss, because it was on a mere question of Practice.

Brockett vs. Brockett,	2 How. 238.
Wylie vs. Cox,	14 " 1.
Parsons vs. Bedford,	3 Peters. 433.

II.

If correct practice required of Defendants in Error to file a new or original Complaint in the Circuit Court, their omission to do so was a mere irregularity in practice, which the Court could disregard. Under the practice in the State Courts of Minnesota, adopted by the Circuit Court, it was the duty of the Court to disregard it.

See General Statutes of Minnesota, (Revision of 1866,) Chapter 66, Section 107.

III.

The Plaintiff in Error, by appearing and answering to the Complaint on file, waived its right to afterwards object to any irregularity in it.

Evans vs. Gee,	11 Peters. 80.
Smith vs Clapp,	15 " 125.
Marine Bank vs. Fulton Bank,	2 Wall. 252.

IV.

The day book and ledger, and what is called the fly leaf of the ledger, were competent evidence as memoranda, in connection with the testimony of the persons making the entries, showing them to have been made in the ordinary course of business, and to have been correctly made.

See Cowen and Hills notes to 4 Am. Ed. of Phillips Ev., note 587 to page 917, of Vol. 2; and page 361, of Vol. 1.

State vs. Rawles, 2 Mott and McCord, (S. C.) 334.
Merrill vs. Ithaca and Owego R. R. Co., 16 Wen. 586.
Halsey vs. Sinesbagh, 15 N. Y. 485.
Guy vs. Mead, 22 Ib. 462.
Briggs vs. Rafferty, 14 Gray 525.
Lapham vs. Kelly, 35 Ver. 195.
Pembroke vs. Allenstown, 41 N. H. 365.

V.

There is no question before this Court as to the sufficiency of the testimony, to lay a foundation for the admission of these items of evidence, because

First.—The objection to them was general, to their competency and materiality, and did not point out any defect in the necessary preliminary proof.

Second.—The testimony to lay a foundation is not all set out in the bill of exceptions, nor its tendency stated. The cross-examination of Joseph Weide, and the entire testimony of Charles Weide, are omitted.

See Paper Book, page 15.

VI.

The entries on the fly were, it is true, abstracts from inventories, themselves only memoranda, but the original inventories were destroyed by the fire, so they could not be produced; and proof of their contents could be made by memoranda of such contents as well as any other fact could be so proved.

Whitney vs. Sawyer, 11 Gray 242.
Wallace vs. Goodall, 18 N. H. 439.

VII.

The charge of the Court, excepted to, was correct. There was no proof of any attempt at fraud or overstatement of loss, except in the statements in the proofs of loss furnished by Defendants in Error to Plaintiff in Error. A mere overstatement of such loss, if made in good faith, the party believing it at the time to be true, cannot be fraudulent.

1 Phil. on Insurance, 499.
Moore vs. Protection Ins. Co., 29 Maine 97.

LORENZO ALLIS,
Of Counsel for Respondent.

Mr. Justice Clifford

Supreme Court of the United States.

DECEMBER TERM, 1869.

No. 187.

THE ÆTNA INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

CHARLES AND JOSEPH R. WEIDE,
DEFENDANTS IN ERROR.

BRIEF OF BARTLEY & STANTON, OF COUNSEL FOR PLAINTIFF IN ERROR.

This is a proceeding in error to reverse the judgment of the circuit court of the United States for the district of Minnesota.

The facts of the case are brief, and appear in the printed record on file, to which reference is here made.

Upon the trial of the case in the circuit court it became material and important for the defendants in error to prove *the value and amount* of the insured property claimed to have been destroyed by the fire of the 22d of February, 1867. This was a vital point, not only as affecting the amount of the loss, but also to meet the defence charging the parties insured with fraud and misrepresentation as to the quantity destroyed. And to establish the amount of the stock on hand at the time of the fire, the defendants in error (plaintiffs below) offered in evidence the "fly-leaf of a ledger," upon which one of the defendants in error (Joseph R. Weide) testified (see pp. 14 and 15 of Record) that he had, in July, 1866, made an abstract from inventories for several years prior to the fire, a copy of which abstract on the fly-leaf (marked C) is in the words and figures following, to wit:

C.

Inventory of goods taken February 27, 1863.

Merchandise	$21,872 34
Book a'cs as pr. ledger, notes, and cash	18,384 65
Real estate	300 00
Store fixtures	396 60
	40,953 59
Liabilities	8,921 14
	32,032 45

1864.

Merchandise	$36,791 21
Book a'c's, notes & cash	24,921 69
Real estate	900 00
Store fixtures	396 60
	63,009 50
Liabilities	17,000 00
	46,009 50

1865.

Merchandise	$47,561 87
Book a'c's, notes & cash	30,927 62
Real estate	900 00
Store fixtures	396 60
	79,786 09
Liabilities	27,140 51
	52,645 58

1866—Feb'y 28th.

Merchandise	$74,520 74
	39,169 64
	900 00
	396 60
	114,986 98
Liabilities	56,656 29
	58,330 69

To this evidence plaintiff in error objected, but the Court

overruled the objection, and it was admitted as evidence before the jury, and the plaintiff in error excepted.

We most respectfully submit, that, there was error in this ruling of the circuit court, for which the judgment must be reversed.

Upon what rule, and with what view can this entry on the fly-sheet be held to be competent evidence?

It cannot stand upon the ground of a day book, or account current of original entries in the due course of business; for this abstract was not made as a matter of original entry, or at the time of the transactions. It is shown to be a mere abstract made from inventories by one of the defendants in error, in July, 1866, and made at one and the same time, the contents of which inventories are not fully disclosed, neither is it shown by whom nor when they were made out, nor whether they were *true and correct* statements or not. If the original inventories themselves had been produced, they could not have been competent evidence, *until shown* to have arisen in the *regular course of the business* here drawn into controversy, and made by some person having authority or whose duty it was to make them, and also that they contained true statements of facts, *neither one of which was shown.*

Again, the competency of this testimony cannot be maintained on the ground of its being a copy of lost papers shown to have contained competent evidence. And it is not claimed, and cannot be pretended, that its competency is maintainable on the ground of its being used to refresh the memory of the witness. He did not refresh his memory, or claim to revive his recollection by means of this paper. On the contrary, the witness distinctly stated, "*that he could not state from recollection* the amount or value of the stock on hand at the time of the fire, *nor at the time of the taking the last inventory in February*, 1866, nor by the purchases or sales after that inventory."

The case of Doe *vs.* Perkins, 3 Ter. R. 749 is in point here. Also Tanner *vs.* Taylor, 3 Ibd., 754.

The cases referred to by the counsel on the other side touching this point, clearly do not sustain them in this case. The competency of this abstract is based on the *original inventories*

from which it was taken, and they were *not shown* to have been *true*, nor to have been duly made, nor to have arisen in the due course of business. This abstract falls plainly within the rule of evidence manufactured by the party himself. And as it was made during the term of the policy, and within seven months of the time of the fire, it may have been made in contemplation of the loss. Such testimony is always unsafe, and should be excluded, unless brought *clearly* within the rule of competency. Even under the strictest rules of evidence, it is impossible for insurance companies to guard against the frauds of connivance at losses, as well as gross exaggerations of *the extent* of losses.

Where secondary evidence in any form is resorted to, it is essential that a foundation be shown for its admission as a preliminary and precedent matter. This certainly does not appear in the bill of exceptions in this case, but the contrary manifestly does appear.

It is argued by counsel for defendants in error, that "the day-books and ledger, and what is called *the fly-leaf* of the ledger, were competent evidence as memoranda, in connection with the testimony of the persons making the entries," &c. There was no question made as to the day-books and ledger, and they need not be brought in here to help out the fly-leaf, as they, especially the day-books, stand upon a very different principle. It is *not made to appear* in the bill of exceptions that it was *expressly* shown that the abstract from the inventories on the fly-leaf was *truly and accurately* made, nor was it shown that *these inventories were true and accurate*, nor by whom, nor how, or under what circumstances they were were taken and made out. The inventories were said to have been destroyed, but *their contents were not proven*, nor in any manner shown, to attest the accuracy of these abstracts. And the matter on the fly-leaf had no connection whatever as a part of the current entries on the day-books, and still less as a part of the posting into the ledger from the day-books. And it is most preposterous to assert that this *unusual matter* on the fly-leaf, made by one of the parties to the suit, in July, 1866, within seven months of the alleged loss, was a simple matter

occurring in *the usual* course of business. It is not unworthy of remark, that the defendant, Mr. Joseph R. Weide, as appears in the bill of exceptions, on p. 14 of the printed record, testified that this ledger commenced October 1, 1866, only three months and twenty-one days prior to the fire, while on p. 15 of the record it appears that he testified that he made the statement on the fly-leaf of the ledger *in July*, 1866, three months prior the time when he says, on p. 14, that the ledger commenced. This is a little peculiar, and, to say the least, not *in the ordinary course of business.* And why this abstract on the fly-leaf was made some short time before the fire, and the inventories destroyed, and why this recent ledger with the fly-leaf, and one item transferred to it from a former ledger, together with the two most recent day-books, were saved, and all the balance of the books and papers destroyed, may justly excite inquiry, and call for the most rigid application of the rules of evidence.

Incompetent and irrelevant testimony is always dangerous, because it is calculated to mislead. And where it is allowed, fraud can always be covered up and concealed. If parties be allowed to manufacture testimony for themselves, the most stupendous frauds may be perpetrated with impunity.

The evidence here objected to required some preliminary showing, to say the least, to lay the foundation for its admissability or competency. Was this made? As the matter on the fly-leaf had no necessary connection with the entries in the day-books, or their postings into the ledger, was the foundation for it laid in the testimony of Joseph R. Weide? He did not pretend, as appears in the bill of exceptions, that he needed it to refresh his memory, or that he did refresh his memory thereby. He testified (p. 15 of the record) that he had no recollection of the amount of the stock on hand at the time of the fire, or at the time the last inventory was made, in February, 1866, nor could he tell it by means of the purchases and sales after that inventory; and he does not pretend that this matter on the fly-leaf enabled him to recollect it, or to tell it from his own knowledge. He stated the amount of the stock on hand at the time of the fire, but he said: "*I get the amount from the fly-leaf of the ledger,*

upon which, in July, 1866, *I made an abstract from inventories for several years prior to the fire; the inventories were destroyed by the fire.*" Thus *the abstract of the contents* of the inventories was shown *as the only ground of his knowledge,* and he does not state who made out the inventories, or when or on what occasion they were made, or whether *true and correct or not,* or whether his abstract was true and accurate, or how far his abbreviation furnished the material substance of the whole contents. This is all his testimony in fact amounted to. He could not state the amount from his knowledge or from his recollection. He gave nothing more than his abstract showed. Thus the contents of the inventories were attempted to be proven without showing the whole contents of them, but simply an abridgment, and without laying the foundation for introducing the original inventories themselves, had they been produced on the trial. There was a wonderful display of ingenuity on the part of the counsel, to say the least of it, in getting evidence before the jury in this form.

The rule whereby a witness is allowed to refresh his memory *by memoranda* is given by Phillipps on Evidence, in the most liberal and comprehensive form, in the language following:

"A witness will be allowed to have his memory, respecting anything upon which he is questioned, refreshed by means of written memoranda. There seem to be three classes of cases in which this may be allowed; first, where the writing serves only to revive or assist the memory of the witness and to bring to his mind a recollection of the fact; secondly, where the witness recollect having seen the writings before; and, though he has no independent recollection of the facts mentioned in it, yet remembers *that, at the time he saw it, he knew the contents to be correct;* thirdly, where it brings to the mind of the witness neither any recollection of the facts mentioned in it, nor any recollection of the writing itself, but which, nevertheless, *enables him to swear to a particular fact,* from the convictions of his mind, on seeing a writing which he knows to be genuine; as for instance, where a banker's clerk is shown a bill of exchange which has his writing upon it, from which he knows that the bill has passed through his hands, though he has no recollection of that fact, nor of his writing anything upon the bill. *In the*

two latter classes of cases the witness must, on seeing the writing, be able to depose positively to the facts to which he is examined, although he may have no present recollection of them independently of the writing."

2 Phil. on Ev., 4th Amer. ed., with Com. & Hill's notes, 916.

Now, the evidence in question in this case falls within neither of these classes. 1st. Because the witness did not pretend that the paper revived or refreshed his memory, or brought to his mind the recollection of a fact. He simply gives the amount of the stock, and then states, "*I get the amount from the fly-leaf*," &c., without undertaking to speak from his recollection at all. 2d. As to the second class, *he does not state*, or pretend to remember, *that at the time he made the abstract he knew positively the contents* of the abstract, much less *the contents* of the inventories, *to be correct from either his knowledge or recollection.* 3d. The testimony does not come within the third class, because he does not state that the *paper enabled him to swear positively to the particular fact that he knew or recollected that the amount given in the paper was correct;* the witness simply gave the amount from the paper, and not from his knowledge or recollection, aided by the paper.

The following appears in the bill of exceptions, (p. 15:)

"The witness identified the day-book and ledger, and further testified, *Charles Weide and I made the entries in these books;* those in the day-books were made at the date of the transactions; they are correct, and so are the entries in the ledger. These books of accounts were kept by plaintiffs in their said business; that they kept no clerk; that the entries in the day-book were the original entries of purchases and sales," &c.

Here the witness spoke of the entries in the day-books and the entries made from them by posting into the ledger. It is manifest, from the context, that he was not speaking of or with reference to the abstract on the fly-leaf; that was a collateral matter, an extra matter, and not comprehended within the current and ordinary business entries in the day-books and ledger, of which the witness was then speaking. If he did include or have reference to the entries on the fly-leaf, he did not speak

from his knowledge or recollection, for he testified in the same connection that he could not state *from his knowledge or recollection* the amount of the stock on hand, either at the time of the fire or at the time of the inventory, and did give the amount expressly from the fly-leaf alone.

The sole object of the evidence of the abstract on the fly-leaf was to show the amount of the stock of goods on hand at the time of the fire. Now, the last inventory shown on the fly-leaf was made in February, 1866, just one year before the fire. And the witness swore positively that he could not state the amount of the stock on hand at the time of the fire from the purchases and sales, which took place after the inventory. This evidence was, therefore, in fact, too remote to be competent. The fact that a wholesale grocery establishment, doing a large business for a series of years, from 1863 to February, 1867, should have on hand in February, 1866, stock to the amount of $70,000, would not be competent to prove the amount on hand in February, 1867.

We respectfully submit that the judgment ought to be reversed. If the defendants in error have a just claim, they can no doubt sustain it hereafter by competent evidence.

BARTLEY & STANTON,
Attorneys for Plaintiffs in Error.